

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

MORRELL GIVENS,

Petitioner,

v.

Civ. No. 09-1048 WJ/RLP

ANTHONY ROMERO, Warden,

Respondent.

MAGISTRATE JUDGE'S SUPPLEMENTAL REPORT AND RECOMMENDATION<sup>1</sup>

1. In the Court's previous Report and Recommendation [Doc. 15], the Court noted that Petitioner had failed to exhaust his administrative remedies and recommended dismissal without prejudice on those grounds.

2. The Petitioner then submitted to the Court a petition for writ of habeas corpus that he filed in state court in August, 2009, which Respondents had failed to locate. The state courts have not ruled on Petitioner's state writ and so his claims remain unexhausted. *See Sims v. Snedecker*, 167 Fed.Appx. 47 (10th Cir. 2006) (unpublished opinion). In the *Sims* case the court noted when a state court allowed a petition to languish due to inordinate delay, the federal courts might excuse the exhaustion requirement because the failure to rule on a matter might itself violate due process. The *Sims* court also noted that a delay of 15 months might raise "grave concerns." *Id.* (citing *Prescher v. Crouse*, 431 F.2d 209, 211 (10th Cir. 1970)).

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<sup>1</sup> Within 14 days after a party is served with a copy of the Magistrate Judge's Supplemental Report and Recommendation (R&R) that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to the R&R in the United States District Court. A party must file any objections within the 14-day period allowed if that party wants to have appellate review of the R&R. If no objections are filed, no appellate review will be allowed.

3. When Mr. Givens filed his petition in this Court, the state court had only had the petition for three months. That time has now grown to eight months, but that remains short of the 15 month presumptive due process violation. Accordingly, I again recommend that the case be dismissed without prejudice for failure to exhaust administrative remedies. The Court does not address the substantive issues raised. The parties have 14 days to submit objections to this Supplemental Report and Recommendation as stated in n.1.

Recommended Disposition

I recommend that the Motion to Dismiss [Doc. 14] be granted and this case dismissed without prejudice.

  
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Richard L. Puglisi  
Chief United States Magistrate Judge